IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1357 of 2003

With

CRIMINAL MISC.APPLICATION No. 14522 of 2006
In
CRIMINAL APPEAL No. 1357 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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PRATAPJI MAGANJI DARBAR & 1 - Appellants
Versus
STATE OF GUJARAT & 2 - Opponents

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Appearance :
MR NK MAJMUDAR for Appellants.
MR KT DAVE, APP for Opponent No. 1.
MR KB PUJARA for Opponent Nos. 2 - 3.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 18/01/2007
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. This appeal is filed by the appellants – original accused against the judgment and order of the learned Additional Sessions Judge, 2nd Fast Track Court, Banaskantha at Deesa on 20.10.2003 in Sessions Case No. 166 of 2002 convicting the appellants under Section 307 of Indian Penal Code and sentencing them for R.I. of 10 years and fine of Rs.3,000/- and in default thereof, to undergo the sentence of R.I. of six months. No separate sentence

was awarded for an offence punishable under Section 324 read with 114 of Indian Penal Code. The appellants – accused were acquitted from the charge of offence punishable under Section 504 of Indian Penal Code and Section 135 of the Bombay Police Act.

2. This appeal was earlier heard and disposed of by this Court vide its order dated 10/11.12.2003 by which the appeal was partly allowed and the conviction of both the appellants – accused came to be confirmed and the sentence imposed by the learned Additional Sessions Judge on the appellant – accused No. 1 was substituted by the period of imprisonment already undergone by him and by fine of Rs. 60,000/- and the sentence imposed upon the appellant – accused No.2 was also substituted by the period of imprisonment already undergone by him with the amount of fine imposed by the learned Additional Sessions Judge.

3. Being aggrieved by and dissatisfied with the

judgment and order of this Court dated 10/11.12.2003 in this appeal, the State of Gujarat as well as complainant had preferred Special Leave Petitions No. 3908 of 2004 and 1494 of 2004 respectively before the Hon'ble Supreme Court. After hearing the parties, the Hon'ble Supreme Court vide its judgment and order dated 19.01.2006 quashed and set aside the judgment and order of this Court dated 10/11.12.2003 and remitted the matter back to this Court for hearing afresh on the question of sentence. This judgment of the Hon'ble Supreme Court is reported in (2006) 2 SCC 359.

4. After the aforesaid judgment and order delivered by the Hon'ble Supreme Court, the appellants preferred Special Leave Petition (Criminal) being Cri. Misc. Petition (CRIMP) No. 7078 of 2006 against the judgment and order dated 10/11.12.2003 passed by this Court in this appeal so far as it confirmed the conviction of both the appellants, is concerned. After hearing the learned advocates appearing for the

parties, the Hon'ble Supreme Court vide its order dated 24.07.2006, has rejected the said Cri. Misc. Petition.

5. Subsequent to the above referred judgment of the Hon'ble Supreme Court, original respondent Nos. 1 & 2 in this appeal have filed Cri. Misc. Application No. 12661 of 2006 before this Court praying for fixing the early date of hearing of this appeal and during the pendency and final disposal of this appeal, seeking direction to the jail authorities to take present appellants – accused into custody as the sentence of imprisonment of 10 years imposed by the learned Additional Sessions Judge on them has not been suspended by the Hon'ble Supreme Court. The said application was notified before this Court on 30.11.2006 and the appellants were directed to remain present on 08.12.2006 before this Court and the appellants had remained present before this Court. An order was passed by this Court on that

day by which Sola Police Station authorities were directed to take the custody of the appellants and to produce them before the Sessions Court, Banaskantha at Palanpur. Pursuant to this order passed by this Court on 08.12.2006, the appellants were taken into custody by Sola Police Station, they were produced before the learned Sessions Judge, Banaskantha at Palanpur and were sent to jail. Since then they are in jail.

6. While disposing of Cri. Misc. Application No. 12661 of 2006 on 08.12.2006, this Court has observed that it was open for the appellants to move an appropriate application seeking their enlargement on bail which would be considered on its merits. Accordingly, the appellants have preferred Cri. Misc. Application NO. 14522 of 2006 seeking suspension of the sentence imposed upon them by the learned Additional Sessions Judge and seeking their release on bail during the pendency of this appeal. This Court has passed an order on 21.12.2006 in the said

application and directed the Registry to place this appeal along with the said application on 22.12.2006. On 22.12.2006, it was mutually decided amongst the parties that instead of deciding this bail application, an appeal may be finally heard and accordingly, both, the appeal as well as the application were adjourned to 17.01.2007.

7. As per the case of the prosecution, the incident in question took place on 30th March 2002, when complainant Sameerkumar and his friend Shailesh were standing near the Pan Shop situated on Bhabhar Highway. After having their Pan, both the accused came there and asked the complainant to pay the charges for their pan. A quarrel started as the complainant refused to accept the demand of the accused. Thereafter at about 9.30 p.m. on the next day, when complainant and his friend Balmukund and Shailesh were standing at the Pan Shop situated Opposite Prakash PCO, both the accused came with knife and started abusing the

complainant. Appellant - accused No.2 - Jayantubha caught hold of the complainant and accused No. 1 Pratap gave knife blow on the right hand of the complainant. He also gave another blow on the left hand of the complainant. When the complainant shouted for help, his friend Shailesh intervened. Both the accused diverted their attention to Shailesh by inflicting blows with knife to him. Shailesh sustained injury on the left side of the neck. Shailesh thereafter fell down on the ground. Thereafter Balmukund and Bharat also intervened. Accused thereafter fled away. Both the injured were taken to the dispensary of Dr.Dhirajbhai, PW1 for treatment who also informed the police. The police thereafter recorded the complaint and started investigation, submitted the charge-sheet against the appellants - accused.

8. Even in the first round of litigation before this Court, the learned advocate appearing for the appellants –

accused has conceded before this Court that in view of the evidence of two injured witnesses out of three eye witnesses supported with medical evidence, it was not possible to challenge the order of conviction. This Court has, therefore, while deciding the appeal earlier on 10/11.12.2003 has not disturbed the finding given by the learned Additional Sessions Judge as far as the conviction of both the appellants – accused is concerned. Even when the said finding was challenged before the Hon'ble Supreme Court by filing Cri. Misc. Petition as stated earlier, the said petition was rejected. In this view of the matter, we do not think it just and proper to closely examine the evidence which may be necessary for the purpose of deciding the question of conviction. The Court, however, in its earlier order has observed that after having gone through the evidence of complainant Sameer, PW2, Shailesh, PW3 and their injury certificates and the evidence of Balmukund, PW4, the Court was convinced beyond any manner of doubt that PW2 and PW3 sustained injuries when the appellants assaulted

them with weapon like knife. From the medical certificates Exhs.25 and 26 issued by Dr.Sahayta of Navjivan Hospital, Bhabhar and from the medical certificates issued by Dr. A.K. Chauhan, at Exhs.35 and 36 of Sameer and Shailesh, the Court observed that these PWs have sustained the following injuries:-

Sameer: Incised wound on dorsal aspect of right forearm - Size 1.2 cm x 2.5 cm. x bone depth.

Incised wound on left arm - size - 5cm x 1 cm x 0.5 cm.

Abrasion on Posterior part of Trunk.size 7 cm x 0.2 cm.

Shailesh: Incised wound on just below left ear size 6 cm x 2.5 cm x bone depth.

Loss of lower part of left Pinna of ear. size - 1.5 cm x 0.5 cm.

CLW on lower part of left Pinna of ear size - 2.5 cm x 1 cm.

The Court has, therefore, come to the conclusion that the involvement of the appellants in the offence in question was established.

9. While considering the question of sentence, this Court observed that the accused are young and are involved in the offence in question on a very trifle issue. This Court has further taken into consideration that the accused have caused injuries with the weapon like knife resulting into injuries described in the medical evidence i.e. incise wound just below the left ear of the size of 6 cm x 2.5 cm x bone deep and loss of lower part of left Pinna of the ear to PW-3 Shailesh & incised wound to other victim. This Court has further observed that both the injured witnesses were thereafter taken for treatment for Plastic Surgery to Hospital at Mehsana and might also have spent substantial amount for the said treatment. A statement was also made before the Court on behalf of the appellants on

earlier occasion that both the appellants have already undergone sentence of two years. This statement was, however, not found to be true and correct. This Court, after considering the entire facts and circumstances of the case, substituted sentence imposed by the Trial Court by the period of imprisonment already undergone by the appellant – accused No. 1 with a fine of Rs.60,000/- and similarly, the sentence of the appellant – accused No. 2 was also substituted by the period of imprisonment already undergone by him, with fine imposed by the trial Court.

10. When this order was challenged by the State as well as the complainant before the Hon'ble Supreme Court and while disposing of both the Special Leave Petitions, it is observed by the Hon'ble Supreme Court that after giving due consideration to the facts and circumstances of each case, for deciding just and proper sentence to be awarded for an offence, the aggravating and mitigating factors and

circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. The Court has further observed that the punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutally with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal”. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance. After discussing certain relevant principles governing the rule of awarding sentence, the Court observed after perusing the record that before the learned Additional Sessions Judge, Deesa an affidavit was filed by the Sub-inspector of Police that accused Pratapji was involved in large number of cases and details of nine cases were given. Similarly, it was

stated that the accused No. 2 Jayantubha, who was an accomplice of accused No. 1 was also involved in nine cases. The Trial Court while dealing with the bail application filed by the accused also noted about the pendency of the cases. The Court further observed that during pendency of the trial, the bail granted to the accused – Pratapji was cancelled for breach of conditions imposed by the Court for grant of bail. The Court found that all these aspects did not appear to have been considered by this Court and this Court proceeded on factually erroneous premises without keeping in view the correct principles relating to punishment. The Hon'ble Supreme Court, therefore, set aside the impugned judgment of this Court and remitted the matter back to this Court for fresh hearing on the question of sentence, uninfluenced by any observation made in the said appeals.

11. In the above background of the matter, Mr. N.K. Majmudar, learned advocate appearing for the

appellants has submitted that even as per the version in the complaint itself, it transpires that the incident in question had taken place on trifle issue of not making payment for Pan. Even as per the deposition of witnesses, it reflects that there was no enmity between the appellants and the respondent Nos. 2 & 3. Thus, there was no mens rea on the part of the appellants to commit murder. He has, therefore, submitted that Section 307 of IPC is not attracted at all. He has further submitted that even considering the nature of injuries, it could not have been held that the injuries caused by the appellants to the respondent Nos. 2 & 3 were of such nature so as to cause death. Even in the medical Certificates, it has been mentioned that the injury was of simple nature. However, without taking into consideration the aforesaid important aspects, the appellants have been convicted by the learned Additional Sessions Judge for offence punishable under Section 307 of IPC. Even the Hon'ble Supreme Court has remitted the matter back to this Court for deciding it afresh on the question of sentence only.

12. Mr. Majmudar has further submitted that after the appellants were taken into custody, the relatives and well-wishers of the present appellants as well as respondent Nos. 2 & 3 have come together and considering the fact that there was no animosity amongst them and the injured witnesses i.e. Respondent Nos. 2 & 3 have recovered completely from their injuries and harmonious relations were established amongst them and since village people have also expected that the dispute should come to an end, all of them have jointly requested the Court through affidavit filed by the respondent Nos. 2 & 3 and assurance is given on behalf of the appellants and duly signed by leading persons of the village that the sentence undergone by the appellants may be treated as sufficient compliance of the order passed by the Hon'ble Supreme Court and necessary order may accordingly be passed in this appeal. In support of his submission, Mr. Majmudar relied on the decision of the Allahabad High Court in the case

of Madan Pal and Another V/s. State of U.P., 1999 CRI. L. J. 3383 wherein the Court has observed that after conviction, the appellants remained in jail for a period of 30 days. Since 04.09.1980, the appellants – accused were on bail from the High Court upto the date of hearing of appeal, which came to more than 18 years. The Court has also taken into consideration the circumstances that the injured and the accused – appellants have entered into a compromise which was filed before the Court duly verified by the Chief Judicial Magistrate. The Court has also recorded the contention on behalf of the appellants – accused that since the offences under Section 308, I.P.C. or 308/34, I.P.C. are not compoundable even with the permission of the Court, it cannot serve the purpose of compounding the offence in case a non-compoundable offence is found to be established, however, it could be legitimately considered as a circumstance justifying the Court in accepting the prayer for reducing the quantum of sentence to the minimum so that the reconciliation between the parties that has taken

place may continue and smooth relations be maintained. After raising this contention before the Court, request was made on behalf of the accused-appellants that the sentence of the appellants-accused may be reduced to the period of imprisonment already undergone and that the sentence of fine may be maintained. The Court found substance in the submission of the learned counsel for the accused-appellants and observed that in such cases, while reducing the sentence, the fine amount is normally enhanced. However, it appears unnecessary to enhance the fine when the parties have compromised. Considering the above submissions and reasons, the Court has partly allowed the appeal and conviction of the appellants-accused for the offence punishable under Section 307 IPC was set aside but he was convicted of the offence under Section 308 IPC and the sentence to term of imprisonment already undergone by him as an under trial and as a convict. Based on this judgment, Mr. Majmudar has submitted that even in that case, the appellants-accused have undergone

the period of sentence only upto 30 days. The Court has passed order to the effect that sentence undergone by the appellants-accused would meet with the ends of justice.

13. Mr. Majmudar has further pointed out that P.S.I., Bhabhar has issued the Certificate that except the case under appeal, in no other cases, the appellant-accused No. 1 is convicted nor any sentence or fine was awarded.

14. Mr. K. B. Pujara, learned advocate appearing for the respondent Nos. 2 & 3 has also confirmed the fact regarding establishment of smooth and cordial relations amongst two families of the appellants as well as the respondent Nos. 2 & 3 and no untoward incident has happened thereafter. He has, therefore, submitted that considering this changed circumstances, appropriate order may be passed by this Court with regard to sentence.

15. Mr. K. T. Dave, learned Additional Public Prosecutor appearing for the State of Gujarat, on the other hand, has submitted that looking to the strong observations made by the Hon'ble Supreme Court, it is not just and proper for this Court to pass an order to the effect that the sentence awarded by the learned Additional Sessions Judge be substituted by the sentence undergone by the appellants. He has further submitted that considering the fact that the conviction has not been challenged and with regard to conviction under Section 307 of the Act, there is a line of decisions of the Apex Court to the effect that the sentence may not be less than five years. He has, however, submitted that the mitigating circumstances pointed out by the appellants may be taken into consideration while taking final decision on the question of sentence. Mr. Dave has pointed out the decision of the Hon'ble Supreme Court in the case of **Sadha Singh and another V/s. State of Punjab, AIR 1985 SUPREME COURT 1130** wherein it is held that in an appeal against the

conviction, it is open to the Court to alter or modify or reduce the sentence after confirming conviction. If the Court is of the opinion that the sentence is heavy or unduly harsh or requires to be modified, the same must be done on well recognised judicial dicta. The Court further held looking to the facts and circumstances of the case that the offence committed by the accused was proved to be one under Section 307 of IPC punishable with imprisonment for life. If the offence is under Section 307 IPC i.e. attempt to commit murder which is punishable with imprisonment for life and the sentence to be awarded is imprisonment for three months, it is better not to award substantive sentence as it makes mockery of justice. Also, if acquittal of some co-accused casts a cloud of doubt over the entire prosecution case, the whole case may be rejected. But acquittal of some of the accused cannot have any relevance to the question of sentence awarded to those who are convicted. The reduction of sentence cannot also be justified on the ground that the appellate court enhanced the fine

and compensated the injured. It would mean that if your pockets can afford, commit serious crime, offer to pay heavy fine and escape tentacles of law. Power of wealth need not extend to overawe court processes. The Court, therefore, held that the High Court wrongly interfered with the order of sentence on wholly untenable and irrelevant grounds, some of them not borne out by the record. In order, therefore, to avoid miscarriage of justice, the Court interfered and set aside the sentence imposed by the High Court and restored the sentence of three years imposed by the learned Sessions Judge. Based on this judgment, Mr. Dave has submitted that substitution of sentence of 10 years R.I. by the sentence undergone by the appellants-accused would not meet the ends of justice.

16. After having heard learned advocates appearing for the respective parties and after having gone through the earlier orders of this Court as well as of the Hon'ble Supreme Court and after having taken into

consideration the submissions made by and on behalf of the appellants, more particularly, the development which has been taken place after the appellants were taken into custody, we are of the view that the incident was taken place in 2002. More than four years have passed. There was completely peace and harmony amongst the two families as well as amongst the entire village. No untoward incident was taken place thereafter. The appellants are of young age. Except some chapter cases and small minor petty cases, nothing has come on record to point out the involvement of the appellants in other criminal cases.

17. It is equally important to note here that the medical evidence disclosed that none of the injuries were cumulatively dangerous to the life of the injured person. The requirement of Section 307 of IPC is that the act must be done with such an intention or knowledge or under such circumstances that if the death be caused by that act, the offence of murder

would be held to be committed. It is pertinent to note that in the present case, the medical evidence showed that none of the injuries were cumulatively dangerous to the life of the injured person and, therefore, there was no intention to cause death and accordingly, the appellant should not be sentenced for the rigorous imprisonment of 10 years under Section 307 of IPC. It is also pertinent to note here that if an injury inflicted on the victim is not sufficient in the ordinary course of nature to cause death, then harsh punishment under Section 307 of IPC should not be imposed. To sustain harsh punishment under Section 307 of IPC, it is necessary that there must be an act done under such circumstances as death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of thing, and if the act complained of is not of that description, the assailant cannot be committed of an attempt to commit murder under Section 307 of IPC. It is crystal clear from the nature of injuries that it was not an intention of the accused nor he had

knowledge that it was likely to cause death. For the purpose of Section 307 of IPC, what is material is the intention or knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. This Court is, therefore, of the view that even after sustaining the order of conviction, the appellants are not liable to be punished by way of substantive sentence for a period of not more than three years.

18. While awarding the substantive sentence of three years to each of these two appellants, the Court has taken into consideration their tender age, the prevailing atmosphere amongst their families and village people and their actual involvement in the commission of offence as well as the nature of injury caused to the appellants and there was now no grudge or grievance on the part of the injured witnesses i.e. respondent Nos. 2 & 3 in this appeal. We, therefore, cannot confirm the sentence as awarded by the learned Additional Sessions Judge

and the same is required to be altered.

19. In view of the above facts and circumstances and the discussion made herein above, we are of the view that the interest of justice would better be served if the appellants are awarded sentence of R.I. Of three years for an offence punishable under Section 307 of IPC. We do not propose to pass any order for fine as that order was already passed by this Court earlier and as per the said order, fine must have been paid by the appellants. If not paid, we pass the same order with regard to fine. Since no separate order was passed by the learned Additional Sessions Judge for an offence punishable under Section 323 of IPC, we do not propose to disturb the said order. While passing this order of sentence of R.I. Of three years for an offence punishable under Section 307 of IPC, the set off of the actual sentence undergone by each of these two accused be given to them.

20. With the foregoing reasons, appeal succeeds partly

and is accordingly partly allowed.

21. In view of the order passed in this appeal, Criminal Misc. Application No. 14522 of 2006 seeking bail does not survive and it is accordingly disposed of as it has no survival value.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya